FRANCIS KIMSAI A

v.

JUDIP KINI

HIGH COURT SABAH & SARAWAK, KOTA KINABALU B
ABDUL RAHMAN SEBLI J
[CIVIL APPEAL NO: K12(B)-14/9-2011]
31 JANUARY 2012

TORT: *Defamation - Slander - Whether impugned statements defamatory of appellant - Whether calculated to disparage appellant - Whether slanderous words must be communicated to general public before assuming defamatory character - Whether respondent liable* C

The appellant and the respondent were relatives and living in neighbouring villages. A dispute arose between them over the ownership of a female buffalo calf as both claimed to be the owner. The Native Court by a unanimous decision decided that the buffalo calf belonged to both the appellant and the respondent and ordered for it to be shared equally between them. Subsequently, the appellant was arrested and remanded following a police report lodged against him by the respondent. The appellant was charged with theft of the buffalo calf but on the date of hearing the prosecution withdrew the charge. Despite the withdrawal of the charge, the respondent continued to spread defamatory statements against the appellant. The issue in this appeal was whether the following words uttered by the respondent in reference to the appellant were defamatory of him: "Pencuri anak kerbau saya" and "Sedikit lagi kamu termakan kerbau si Francis curi." The appellant claimed that the words complained of in their natural and ordinary meaning meant and were understood to mean, *inter alia*, he was a thief and of no moral values. The appellant therefore claimed for damages against the respondent. The magistrate dismissed the appellant's claim. Hence, the appellant appealed. D E F G H

Held (allowing appellant's appeal; setting aside magistrate's decision):

(1) The impugned statements were found to be defamatory of the appellant. Any right thinking bystander would readily understand them to mean what the respondent intended them I

A to mean *ie*, that the appellant was a thief. Given the bad blood between the respondent and the appellant, there was no doubt that the words were spoken as words of abuse. Theft is a criminal offence punishable with imprisonment. The words were therefore slanderous and actionable *per se* without proof
B of special damage. (para 20)

(2) The respondent had failed to prove that the statements were in substance and in fact true. The respondent's defence that the buffalo calf belonged to him was untenable as the Native
C Court had ruled that the buffalo calf was to be shared equally between him and the appellant. Further, the appellant had, to the respondent's knowledge, been cleared of the theft charge. It was patently clear that the accusation was calculated to disparage the appellant and lower him in the eyes of right
D thinking members of the public. (para 22)

(3) There is no law to say that slanderous words must be communicated to the general public before they assume a defamatory character. A slanderous statement is a slanderous
E statement all the same even if communicated to only one person if otherwise it has a tendency to defame. However, whether the slanderous statement is communicated to a single person or to the whole world is relevant in determining the quantum of damages to be awarded, along with other relevant
F factors. The learned magistrate failed to appreciate that the defamatory words were uttered in the presence of others. Clearly the respondent had intended the words to be heard by all those present. The learned magistrate was therefore wrong in holding that the words uttered by the respondent
G were not defamatory of the appellant. The respondent was liable for slander as pleaded. (paras 23 & 24)

[A global award of RM5,000 as damages; interest on the judgment sum shall be at the rate of 8% per annum from date of judgment to date of full payment.]

H

Case(s) referred to:

Abdul Rahman Talib v. Seenivasagam & Anor [1966] 1 LNS 5 FC ***(refd)***
Alloysius Tan Ting Kai v. Ng Hong Kheng & Ors [1982] CLJ 122; [1982] CLJ (Rep) 398 HC ***(refd)***
Austin v. Culpepper [1684] 4 Show 313 ***(refd)***
I *Brownlie v. Thompson [1859] 21 M 480* ***(refd)***
Byrne v. Deane [1937] 1 KB 818 ***(refd)***

Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***
D & L Caterers Ltd. v. D'Ajou [1945] 1 KB 210 ***(refd)***
Gray v. Jones [1939] 1 All ER 798 ***(refd)***
Griffin v. Divers [1922] SC 605 ***(refd)***
Hellwig v. Mitchell [1910] 1 KB 609 ***(refd)***
Jones v. Skelton [1963] 3 All ER 952 ***(refd)***
M'Gregor v. Gregory [1843] 11 M & W 287 ***(refd)***
Maclaren v. Robertson (1859) 21 D 183 ***(refd)***
S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC ***(refd)***
Tolley v. Fry [1930] 1 KB 479 ***(refd)***
Webb v. Beavan [1883] 11 QBD 609 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 413
Penal Code, s. 379

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 28, para 54

For the appellant - Sonny Durai; M/s Norbert Chin & Co
For the respondent - Intan Timor Shamsudin; M/s Shamsudin Wong & Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli J:

The Issue

[1] The issue in this appeal is whether the following words uttered by the respondent in reference to the appellant are defamatory of him:

> "Pencuri anak kerbau saya" and "Sedikit lagi kamu termakan kerbau si Francis curi".

[2] Loosely translated the words mean: "Thief of my buffalo calf" and "You nearly ate the buffalo that Francis stole".

The Facts

[3] The facts giving rise to this action are as follows. The appellant and the respondent are relatives in law and living in neighbouring villages in the district of Kuala Penyu, Sabah. A dispute arose between them over the ownership of a one year old female buffalo calf. Both claimed to be the owner of the calf.

[4] The dispute was brought to the attention of the Village Chief who then referred the matter to the Kuala Penyu Native Court for ruling. On 9 March 2009 a four member panel of the Native Court by a unanimous decision decided that the buffalo calf belonged to both the appellant and the respondent and ordered her to be shared equally between them. A wise decision indeed, except that it is not clear how she was to be shared by the two men.

[5] Apparently the respondent was not happy with the decision. In the evening of the same day he lodged a police report against the appellant. This was followed by another report on 31 February 2009 which led to the arrest of the appellant and he was remanded for three days to facilitate police investigation. The buffalo calf was not spared the ordeal. She was seized from the appellant and brought before the Second Class Magistrate Kuala Penyu who ordered her to be handed over to the respondent pursuant to s. 413 of the Criminal Procedure Code.

[6] The appellant was subsequently charged with theft of the buffalo calf under s. 379 of the Penal Code but on the date of hearing the prosecution withdrew the charge, which effectively means that he did not steal a buffalo from the respondent. Obviously the police were not aware nor informed of the Native Court decision.

[7] Despite the withdrawal of the charge, the respondent continued to spread defamatory statements against the appellant. Matters came to a head when the respondent communicated the impugned words to one Pitrus @ Itos bin Sikal on the occasion of the fifth anniversary of the appellant's grandmother's death. The anniversary was held at Pitrus' house who happened to be the uncle to both the appellant and the respondent. He was 73 years old at the material time and hails from Kampung Menunggang Kuala Penyu.

[8] As fate would have it the young buffalo calf paid the ultimate price for being caught in the epicenter of dispute between the appellant and the respondent. She was slaughtered and prepared as food for the ceremony. A sad end to a brief existence. According to Pitrus when the respondent uttered the words "Sedikit lagi kamu termakan kerabau si Francis curi" they were uttered in front of the guests who had come for the anniversary.

He said he felt embarrassed because the words could be understood by the guests to mean that they were being served with meat from a stolen buffalo.

The Respective Claims

[9] The appellant claims that the words complained of in their natural and ordinary meaning meant and were understood to mean that:

(1) he was a thief;

(2) he had stolen a buffalo;

(3) he was an irresponsible person, of no moral values and not a trustworthy resident of the village.

[10] As a consequence of the defamatory statements the appellant claims that his character, credibility, and reputation had been seriously damaged and had caused him to suffer considerable distress, embarrassment and humiliation, including being arrested by the police and charged with theft of a buffalo. He therefore claimed against the respondent for the following:

(a) Damages up to RM20,000 for slander;

(b) Aggravated damages of up to RM7,000 for slander;

(c) Exemplary damages of up to RM5,000 for slander;

(d) Statutory interest on the judgment sums at the rate of 8% per annum from the date of judgment to the date of payment;

(e) Costs of RM5,000 *in lieu* of taxation.

(f) Such other relief as the court deems fit.

[11] The respondent on his part counterclaimed for a sum of RM100,000 against the appellant, also for defamation for uttering the following words against him:

> Kau yang curi anak kerbau saya dan kau berpakat dengan Ketua Kampung masa tandakan kerbau jadi kau punya

[12] Translation: "It was you who stole my buffalo calf and you conspired with the Ketua Kampung when marking the buffalo so that she could be yours."

A **The Magistrate's Decision**

[13] At the conclusion of the trial, the learned magistrate dismissed both the claim and the counterclaim. As against the appellant he found that the impugned words were not defamatory and as against the respondent he found that the respondent failed to prove that the defamatory words were uttered by the appellant. The respondent seems content with the decision and did not file any appeal, but the appellant is not, hence the present appeal.

What Constitutes Defamation

[14] There is no dearth of authority on what in law amounts to defamation. The test of whether the words complained of are defamatory is an objective one. They are defamatory if, when viewed objectively they have a tendency to harm a person by lowering him in the eyes of right thinking members of the public. There is no necessity for the plaintiff to prove falsity of the words complained of once they are found to be defamatory of him: see *Abdul Rahman Talib v. Seenivasagam & Anor* [1966] 2 MLJ 66 SC; [1966] 1 LNS 5.

[15] In *Alloysius Tan Ting Kai v. Ng Hong Kheng & Ors* [1982] CLJ 122; [1982] CLJ (Rep) 398 George Seah J (as he then was) held that it is enough if the words complained of render the plaintiff contemptible or ridiculous or tend to degrade or lower him in the estimation of men whose standard of opinion the court can properly recognise, or to hinder mankind from associating or having intercourse with him, citing *Tolley v. Fry* [1930] 1 KB 479; *Byrne v. Deane* [1937] 1 KB 818; *Austin v. Culpepper* [1684] 4 Show 313; *Maclaren v. Robertson* (1859) 21 D, 183; *Griffin v. Divers* [1922] SC 605; *Brownlie v. Thompson* [1859] 21 M 480; *M'Gregor v. Gregory* [1843] 11 M & W 287.

[16] Whether the words complained of are capable of bearing a defamatory meaning is in essence a question of law that turns upon the construction of the words published: see *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461 CA. The following broad definitions of defamation and slander can be found at www.expertlaw.com:

> Generally speaking, defamation is the issuance of a false statement about another person, which causes that person to suffer harm. Slander involves the making of defamatory statements by a transitory (non-fixed) representation, usually an oral (spoken) representation.

[17] The learned authors of *Gatley on Libel and Slander* 8th edn, have this to say on the subject: A

> A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of right thinking persons generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency. B

[18] In *Jones v. Skelton* [1963] 3 All ER 952 Lord Morris opined as follows at p. 958: C

> The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be part of the ordinary and natural meaning of words (see *Lewis v. Daily Telegraph Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense. D E F

[19] In an action for defamation it is for the plaintiff to first discharge the burden of proving that the statements complained of are defamatory of him. It is only upon such proof that the burden will shift to the defendant to prove that the statements are in substance and in fact true: see *S. Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC; *Abdul Rahman Talib, supra.* G

[20] Are the impugned statements defamatory of the appellant? In my view they are. Any right thinking bystander would readily understand them to mean what the respondent intended them to mean, ie, that the appellant is a thief. Given the bad blood between the respondent and the appellant, there can be no doubt that the words were spoken as words of abuse. Theft is a criminal offence punishable with imprisonment. The words are therefore H I

slanderous and actionable *per se* without proof of special damage: see *Webb v. Beavan* [1883] 11 QBD 609; *Hellwig v. Mitchell* [1910] 1 KB 609; *Gray v. Jones* [1939] 1 All ER 798; *Halsbury's Laws of England*, 4th edn vol. 28 para 54; *Gatley on Libel and Slander, supra*;

[21] In *D & L Caterers Ltd. v. D'Ajou* [1945] 1 KB 210, 213 Stable J when speaking of spoken words imputing a crime punishable with corporal punishment said:

> It is true that, in the absence of actual damage, a slander, which imputes a criminal offence, must impute the commission of a criminal offence which can be punished corporally and it is true that a company cannot be punished corporally at all: it cannot either be flogged, sent to prison or hanged. The true legal position is, I apprehend, that spoken words which impute a crime that is punishable corporally – by imprisonment, whipping or hanging – are actionable without proof of special damage.

Whether Respondent Proved Truth Of Statements

[22] The appellant having established the defamatory nature of the statements, it fell upon the respondent to prove that the statements were in substance and in fact true. On the evidence it is clear that he has failed to discharge that burden. The focus of his defence was to establish that the buffalo calf belonged to him. Clearly this defence is untenable as the Native Court had ruled that the buffalo calf was to be shared equally between him and the appellant. He did not appeal to the Native Court of Appeal against the decision, which means he accepted the decision of the Native Court. Further, the appellant had, to the respondent's knowledge been cleared of the theft charge. There was therefore no justification for him to persist with his accusation against the appellant. It is patently clear that the accusation was calculated to disparage the appellant and lower him in the eyes of right thinking members of the public.

Defamatory Words Communicated To Only One Person

[23] The learned magistrate's finding was that since the slanderous words were communicated to only one person, namely to Pitrus @ Itos bin Sikal and not spread over to the appellant's friends and relatives, let alone to the general public in Kuala Penyu, they were not defamatory. With due respect to the learned magistrate there is no law, not to my knowledge at least

to say that slanderous words must be communicated to the general public before they assume a defamatory character. A slanderous statement is a slanderous statement all the same even if communicated to only one person if otherwise it has a tendency to defame. But of course whether the slanderous statement is communicated to a single person or to the whole world is relevant in determining the quantum of damages to be awarded, along with other relevant factors.

[24] The learned magistrate also failed to appreciate that the defamatory words were uttered in the presence of the guests who had gathered for the feast. Clearly the respondent had intended the words to be heard by all those present and not by Pitrus alone. Furthermore, one must accept the reality that in this time and age defamatory words, once communicated could go viral and spread beyond control and beyond borders. It is naive to think that a defamatory statement stops at the first person it is communicated to.

[25] For reasons aforesaid the learned magistrate was therefore wrong in holding that the words uttered by the respondent were not defamatory of the appellant. The appellant's appeal is therefore allowed. The learned magistrate's decision is set aside and is substituted with a finding that the respondent is liable for slander as pleaded. As for damages I think a global award of RM5,000 is fair and reasonable having regard to all the circumstances of the case, and I so order. Interest on the judgment sum shall be at the rate of 8% per annum from the date of judgment to the date of full payment. Costs of the proceedings in this court and in the court below shall be borne by the respondent, to be taxed unless otherwise agreed.